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Supreme Court, U.S.
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No. 87-2042

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WARNER CABLE COMMUNICATIONS INC.,
Petitioner

v.

CITY OF NICEVILLE, FLORIDA, and
THE STATE OF FLORIDA,
Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a defendant has been denied due process of law within the meaning of 28 U.S.C. § 1257(3) when the issues defendant claims have not been heard were not within the scope of a certain civil action but are currently being litigated in two other civil actions, one of which is currently pending on appeal in a state court and the other is currently pending in a federal trial court?

LIST OF PARTIES

The parties to the proceeding before this Court are the petitioner Warner Cable Communications Inc. and the respondent City of Niceville, Florida. The petitioner has also listed the State of Florida as a respondent. Presumably, this is because the petitioner is claiming that the courts of the State of Florida have denied due process to the petitioner. However, in the state court proceeding, the State of Florida and the taxpayers, Property Owners and Citizens of Niceville, Florida, including non-residents owning property or subject to taxations therein, were the primary defendants in the lawsuit. See p. 13a of Appendix of Petitioner. Warner appeared as an intervenor-defendant.

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The respondent, City of Niceville, Florida, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Supreme Court of Florida's opinion entered in this case on January 14, 1988, and that court's denial of petitioner's motion for rehearing on March 16, 1988. That opinion is reported at 520 So.2d 245 (1988).

STATEMENT OF THE CASE

There are three lawsuits currently pending between petitioner and respondent, all involving the proposed cable television system intended to be owned and operated by

respondent, the City of Niceville, Florida. The main lawsuit is one filed in 1985 in the United States District Court for the Northern District of Florida by petitioner against the respondent alleging violations of 42 U.S.C. § 1983 and constitutional violations. *Warner Cable Communications, Inc. v. City of Niceville, et al.*, (USDC, ND Fla. Pensacola Div., PCA 85-4414-RV). The second case is *Byrd, et al. v. City of Niceville*, (Circuit Court, Okaloosa County, Florida Case No. 87-1447-CAC). The Petition for a Writ of Certiorari filed with this Court involves the third case, a revenue bond validation proceeding initiated by respondent for the purpose of financing a municipally owned cable television system. The due process issue presented to this Court is one of approximately twenty separate issues that were raised by petitioner on an appeal to the Florida Supreme Court in an attempt to reverse the final judgment issued by the trial court validating the bond issue. The bonds have not been sold because of the other two lawsuits currently pending and the pending appeal in this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Florida Supreme Court did address the due process issue even though the per curiam opinion did not specifically mention same.

The petitioner alleges on pages 5 and 6 of its brief that the Supreme Court of Florida failed to address petitioner's constitutional claim of denial of due process. The reason given is that, in its decision, the Florida Supreme Court did not specifically refer to same. In this regard it should be noted that, in its brief on appeal to the Florida Supreme Court, the petitioner presented approximately twenty separate legal arguments as grounds for reversal of the trial court's decision contained in four separate general categories of assignments of error. The due process issue was merely one of these twenty some odd issues. Obviously, the Florida Supreme Court did not deem it necessary to address each and

every one of these many arguments made by the petitioner in the contents of the court's opinion. The following paragraph is quoted from the respondent's brief in response to petitioner's motion for rehearing and clarification before the Florida Supreme Court:

> Warner states in its brief that the decision of this Court overlooks and does not address the issue of denial or appellant's rights of fundamental due process. If in fact this Court did overlook that issue or any of the other numerous issues argued by Warner which were not specifically addressed in detail in this Court's per curiam opinion, then it would certainly be appropriate for this Court to address same upon rehearing. However, the City of Niceville assumes that this Court did not overlook any of the many issues raised by Warner and that the following statement made by Judge Wigginton in a 1958 First District Court of Appeals Case that was on petition for rehearing is applicable: ". . . An opinion should never be prepared merely to refute the arguments advanced by the unsuccessful litigant. For this reason it frequently occurs that an opinion will discuss some phases of the case, but will not mention others. Counsel should not from this fact draw the conclusion that the matters not discussed were not considered." State v. Green, 105 So.2d 817, 819 (1st DCA 1958).

The above was respondent's argument to the Florida Supreme Court on this point on motion for rehearing and is respondent's same argument to this Court on this point.

II. The state courts properly considered only three legal issues in the revenue bond validation proceeding and the final judgment encompassed matters only within the scope of those three legal issues.

The scope of judicial review in a bond validation proceeding in the State of Florida is sharply limited to three issues. As stated by the Florida Supreme Court in its opinion:

> It extends only to determining if the public body has the authority to issue the subject bonds and if the purpose of the bonds is legal and to insuring that the bond issue complies with all legal requirements.

See p. 2a of Appendix to Petition. These are the same three issues that were the subject matter of the trial between the parties in this case. As stated by the trial judge in his March 16, 1987, order following a case management conference:

> . . .
>
> b. At final hearing in this bond validation proceeding, the three issues to be considered and determined by the Court are:
>
> (1) whether the City of Niceville has the authority to issue such bonds under the Florida Constitution and statutes;
>
> (2) whether the purpose of the obligation is legal; and
>
> (3) whether the City of Niceville's authorization of the obligation complies with the requirements of law.
>
> *Wohl v. State of Florida*, 480 So.2d 639 (1985); *McCoy Restaurants, Inc. v. City of Orlando*, 392 So.2d 252 (1980).

These are the three issues that were litigated at trial and evidence was heard from all parties on each issue. In this regard it should be noted that the office of the State Attorney of the State of Florida was the primary defendant in the case. In Florida, the State Attorney's office represents the taxpayers and citizens in a bond validation proceeding. See § 75.05, Fla. Stat. The office of the State Attorney agreed with the respondent's legal position in both the trial court and the Florida Supreme Court. Petitioner appeared in the case as an intervenor.

Contrary to petitioner's assertion, petitioner was freely allowed to cross-examine the respondent's witnesses on

the three legal issues outlined above which were within the scope of the trial. Respondent was also allowed ample opportunity to present evidence on these three issues. What petitioner complained of to the Florida Supreme Court and is further complaining of in this Court is that the collateral issues that it attempted to raise outside the scope of these three issues were rejected by the trial court although petitioner attempted to introduce such evidence under the guise of one of these pertinent issues. The trial court was very careful to question petitioner's counsel on each item as to the purpose of same before the court made its rulings on the admissibility of the proposed testimony or document in question. In each instance wherein the court ruled against the petitioner, the court permitted lengthy proffers of the evidence into the record for review by the Florida Supreme Court. The respondents' position is that the trial court was correct on all rulings and, if there were any errors, they were harmless in nature, not reversible on appeal. Each and every one of the trial court's findings contained in the final judgment (see pp. 4a-12a of Appendix to Petition) is supported by competent and substantial evidence and legal authority. The final judgment made findings and rulings only on the subject matters encompassed by the three pertinent issues. The Florida Supreme Court has agreed with the trial court's ruling on two separate occasions after receiving lengthy briefs from both parties, which briefs included argument on the due process issue that is before this Court.

III. There is no conflict between the *Saunders* case and the instant case.

This case is totally different from the question involved in *Saunders v. Shaw*, 244 U.S. 317 (1917), cited by petitioner. Although the procedural aspects of the *Saunders case* are somewhat confusing, this Court stated on page 319 of that opinion, "But when the act complained of is the act of the supreme court done *unexpectedly* at the

end of the proceeding . . ." (emphasis supplied). The action that was taken unexpectedly by the Louisiana Supreme Court in the *Saunders* case was to reverse on rehearing, apparently based upon some factual matters that one of the parties had not had a sufficient opportunity to rebut, ironically because of his own objections at trial. Also, there was evidently a procedure in 1917 (the date the case was decided) wherein the Chief Justice of the State Supreme Court could grant some type of writ after a rehearing based upon an additional filing of assignment of errors by an aggrieved party. This procedure, coupled with the highly unusual facts and proceedings of that case, prompted this Court to grant jurisdiction. *Saunders, Id.* at 319.

There are no such peculiar circumstances involved in the instant case. Petitioner had ample opportunity to present its evidence, made appropriate proffers of its evidence into the record, and was heard by the Florida Supreme Court twice on the due process issue. There were no surprises or matters that occurred "unexpectedly at the end of the proceeding" other than the expectation of petitioner that it would receive favorable rulings from the Florida courts.

IV. Petitioner is currently receiving due process in both the state and federal courts.

Petitioner is currently receiving due process in two courts on matters not considered in the bond validation proceeding. This due process is being provided by the Florida court system in the *Byrd, supra,* lawsuit and the federal court system in the federal suit between the parties. All of the issues that were deemed to be collateral to the bond validation proceeding have been raised and are being currently litigated in either the other state court proceeding (*Byrd, supra*) or the federal court proceeding (*Warner, supra*). In the *Byrd* case, there were seventeen (17) different counts raised in the forty-four (44) page first amended complaint. The trial judge in

that case granted respondent's motion to dismiss all counts of that complaint. See pp. 47a-52a of Appendix to Petition. Six (6) of those counts were dismissed because petitioner attempted to relitigate the same three (3) issues that have already been litigated in the bond validation proceeding. The other eleven (11) counts which contained the collateral matters not decided by the bond validation proceeding were dismissed on other grounds or voluntarily dismissed by the petitioner. See pp. 47a-52a of Appendix to Petition. Petitioner has already filed its formal notice to appeal that order dismissing the complaint and will receive further due process on those other issues by the Florida appellate court system in the *Byrd, supra* case or the federal court system in the federal case. It is simply not appropriate for this Court to spend its valuable time considering legal issues that are presently being litigated in the state and federal court systems. Furthermore, there is absolutely no conflict between the decision of the Florida Supreme Court in the instant case and the *Saunders* case. If this Court were to accept jurisdiction, whatever decision that was made would have absolutely no precedential value or provide any guidance for future litigants. What the Florida courts did in this bond validation proceeding was to correctly follow the Florida law and consider only the three pertinent issues involved in a bond validation proceeding, no more, no less.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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